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No. 749

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

BOARD OF PUBLIC INSTRUCTION OF BROWARD COUNTY, FLORIDA, a public body organized and existing under the laws of the State of Florida; and WILLIAM C. DRAINER, Superintendent of Public Schools of Broward County, Florida, *Petitioners,*

v.

FREDERICK ALLEN and TIMOTHY ALLEN, minors by W. GEORGE ALLEN, father and next friend; and VON D. MIZELL, President of the National Association for the Advancement of Colored People, and all others similarly situated, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND MOTION TO ADVANCE

CHARLES E. PLEDGER, JR.
PLEDGER & MAHONEY
925 Washington Building
Washington, D. C. 20005

WILLIAM M. O'BRYAN
FLEMING, O'BRYAN & FLEMING
1415 East Sunrise Boulevard
Fort Lauderdale, Florida 33304

EDWARD J. MARKO
MENDEZ, SHAW, MARKO & STEPHANY
1040 Bayview Drive
Fort Lauderdale, Florida 33304

Attorneys for Petitioners

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MOTION TO ADVANCE

Petitioners respectfully move that the Court advance its consideration and disposition of this case. It presents issues of great constitutional significance which require early decision by the Court for the reasons explained in the annexed petition for a writ of certiorari.

WHEREFORE, petitioners pray that the Court:

1. Advance consideration of the petition for a writ of certiorari and any cross-petition or other response thereto during the October Term, 1970.

2. If the Court determines to grant the petition for writ of certiorari, arrange such procedures as will permit early decision on the merits as the Court may deem appropriate. If the Court decides to hear argument, it is suggested that the Court consider the case on the original record without printing, as done by the Court of Appeals, or alternatively to permit reproduction of an appendix by other than standard typographic means.

Respectfully submitted,

CHARLES E. PLEDGER, JR.
PLEDGER & MAHONEY
925 Washington Building
Washington, D. C. 20005

WILLIAM M. O'BRYAN
FLEMING, O'BRYAN & FLEMING
1415 East Sunrise Boulevard
Fort Lauderdale, Florida 33304

EDWARD J. MARKO
MENDEZ, SHAW, MARKO & STEPHANY
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on August 18, 1970.

OPINIONS BELOW

The opinions of the courts below directly preceding this petition are as follows:

1. Findings of fact, conclusion of law and final judgment of April 30, 1970, unreported, (Appendix hereto 1a).[1]

2. Opinion of the Court of Appeals filed August 18, 1970, not yet reported, (32a).

3. Order of August 28, 1970, unreported, (47a) with attached school superintendent's implementation report of August 24, 1970, (54a).

4. Order of September 4, 1970, unreported, (99a).

JURISDICTION

The judgment of the Court of Appeals was entered on August 18, 1970. The jurisdiction of this Court is invoked under 28 *U.S.C.* Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the elementary school desegration plan ordered by the Court of Appeals which requires 27,000 White and Black students to be bussed to distant racially balanced schools, but permits 25,000 other students to attend neighborhood schools violates the Equal Protection Clause.

2. Whether the Court of Appeals violated Due Process and abused its discretion in ordering implementation of an elementary school desegregation plan of its own creation rather than remanding the case to the District Court to hold additional hearings and develop an acceptable plan.

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[1] The appendix of opinions below is printed in a separate volume because it is voluminous.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Constitution of the United States, Amendment XIV, Section 1:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. The Civil Rights Act of 1964 (Pub. Laws 88-352, Title IV, Section 401; 78 Stat. 246, 42 USCA (Chapter 21) Section 2000c which provides in pertinent part:

> "As used in this sub-chapter . . .
>
> "(b) 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

3. The Civil Rights Act of 1964 (Pub. Laws 88-352, Title IV, Section 407; 78 Stat. 248, 42 U.S.C.A. (Chapter 21) Section 2000c-6 (a) (2) which provides in pertinent part:

> ". . . nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any schools by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. . . ."

STATEMENT OF FACTS

1. INTRODUCTION.

Petitioners seek review of a three-judge panel decision of the United States Court of Appeals for the Fifth Circuit reversing certain portions of an order of District Judge Ted Cabot of the Southern District of Florida entered on April 30, 1970. The order had required immediate creation of a unitary, non-racial school system in Broward County, Florida. The portions of the order reversed concerned only the composition of student bodies at some of the elementary schools.

2. PROCEEDINGS BELOW.

Petitioners, the Broward County Board of Public Instruction and the school superintendent, were the defendants in the District Court and the appellees in the Court of Appeals.

Respondents are the father of two public school students and the President of the Broward County Chapter of the National Association for the Advancement of Colored People. They were the plaintiffs in the District Court and the appellants in the Court of Appeals.

Respondents, as plaintiffs, brought a class action against petitioners, as defendants, on January 9, 1970 in the United States District Court for the Southern District of Florida. Jurisdiction vested in the court under Title 28, *U.S.C.* Section 1343 (3) and Title 42, *U.S.C.* Sections 1983 and 1985. Plaintiffs contended that defendants were maintaining a racially segregated dual school system in violation of *Brown* v. *Board of Education,* 347 U.S. 483, (1954) (Brown I) and *Brown*

v. *Board of Education,* 349 U.S. 294, (1955) (Brown II).

The first hearing occurred on January 16, 1970. The court found by its order of January 22, 1970 that the defendants were not operating a unitary integrated school system, but were operating a dual system of public schools segregated by race. Therefore, the court ordered defendants to operate thereafter a unitary school system and to file by February 16, 1970 a comprehensive plan to establish such a system.

Defendants timely filed their desegregation plan, and plaintiffs filed their objections to it.

A hearing was held on March 3, 1970 concerning the plan and objections to it. The court ordered defendants to consult and cooperate with the Florida School Desegregation Consulting Center at the University of Miami (hereinafter "Desegregation Center") "with special emphasis on eliminating the remaining all-Black elementary schools."

The Desegregation Center made its report on March 27, 1970 which stated in pertinent part at pages 9-10:

> "The survey team was not able to make specific recommendations as to the rezoning of elementary attendance areas because of insufficient data as to where pupils will reside by race in September of 1970. Furthermore, once the guiding principles for zoning are laid down, school officials are better able than others to establish proper attendance zones.
>
> "It is *recommended* that the school system be requested to submit new elementary attendance zones for the court's consideration which would eliminate as many all-black schools as possible. At the

> same time, pairings are recommended in this study for each all-black elementary school so that if rezoning of any particular school is not productive pairing can be used as an alternative method." (Emphasis in original.)

By changing attendance zones, defendants were able to desegregate all but three elementary schools. The court changed this to four all-Black elementary schools.[2]

The respondents on appeal argued that rezoning did not create a high enough racial balance in some of the elementary schools, i.e., 13 elementary schools out of a total of 83 were left with student bodies that were 90 per cent or more Black. Respondents favored the alternative pairing method suggested by the Desegregation Center. The Court of Appeals in its opinion of August 18, 1970 rejected both the pairing proposals made by the educators at the Desegregation Center and the rezoning proposals of the defendant educators incorporated by the District Court into its Final Judgment. Instead, the appellate court on its own developed a clustering method and specifically directed exactly which schools would be included in each cluster and that the District Court must assign grade levels from all the schools in a cluster to each school, e.g., all grades 1-2 would go to one school; all grades 3 to another; grades 4 to a third; and grades 5-6 to still a fourth school.

---

[2] It should be noted that the Court of Appeals found that all these elementary schools were desegregated in every respect except composition of student bodies, and all secondary schools were desegregated in every respect.

3. THE BROWARD COUNTY SCHOOL SYSTEM IN 1969-70, BEFORE COURT-ORDERED DESEGREGATION.

The Broward County School System has been following an orderly process of integration since 1962. The 1965 State School Plant Survey was designed to accelerate the elimination of the dual school system. Another survey in 1967 updated the 1965 one. The all-Black Dillard branch of the Broward Junior College was eliminated in 1963. The all-Black Deerfield Park Junior High was eliminated in 1966, and integrated into the previously all-White Deerfield Junior High School. The all-Black Attucks Senior High School was phased out over a three-year period, and the students integrated into previously all-White senior high schools in the area. This was completed in 1968-69.

The 1967 School Plant Survey provided the basis for developing a five-year qualitative improvement program that runs through the 1972-73 school year. One of the program's goals is completion of the desegregation process. To finance the program, the school system proposed and the electorate approved a $108.6 million bond issue in 1968. This is three times as large as the largest school bond issue ever passed in Florida.

A detailed description of the five-year plan is contained in the Broward County Desegregation Plan proposed by the defendants on February 16, 1970. In relevant part, the five-year plan proposes construction of 45 new schools: 9 senior high schools, 8 middle schools, and 28 elementary schools. The site of each new school is being chosen in order to promote integration of student bodies. Schools which the 1967 survey found to be inferior and which cannot be brought up

to the level of other schools in the system are being phased out.

The grade alignment is being changed as follows:

High Schools	From 10-12	To 9-12
Junior High Schools	From 7-9	To Elimination
Middle Schools	From Nonexistent	To 6-8
Elementary Schools	From 1-6	To K-5

The school system at the present time is in a state of transition. New schools are being added each year while old schools are either being modernized where possible or phased out. Some schools are still on the old grade alignment, while many others have been switched to the new

During the 1969-70 school year the Broward School System included 112,024 students of which 86,523 were White and 25,501 were Black, i.e., 77% of the students were White and 23% were Black. The percentage of Black students attending schools with White students was 48.3%.

The school system has been growing at the rate of 6-8% per year, which is consistent with the extraordinary rapid growth of the county.

Growth of Student Population

	White	Black
1969-70 Total—112,024	86,523 (77%)	25,501 (23%)
1970-71 (projected) Total—118,693	92,008 (78%)	26,685 (22%)

New students = 6,669 Growth rate = 6%

In order to comply with U.S. Department of Education (HEW) Desegregation Guidelines, the completion date for transition to a fully desegregated unitary school system was advanced to September, 1971 when a major portion of the school construction program will be completed. The District Court order further advanced the deadline to June 17, 1970, which has been met.

The high schools and middle schools are fairly large, and consequently draw their students from fairly large attendance zones. Moreover, there are several all-Black neighborhoods distributed throughout the county. Together, these two facts make desegregation of the student bodies of the high schools and middle schools a not too difficult accomplishment. Indeed, the Court of Appeals did not object to the District Court's plan in this respect.

On the other hand, the elementary schools are based on the premise that every neighborhood should have its own elementary school. During the past school year, 1969-70, there were 84 elementary schools as compared to 20 middle schools and 11 high schools. Thus the elementary schools are fairly small and draw their students from fairly small attendance zones.

4. THE DISTRICT COURT'S DESEGREGATION PLAN.

The plan for a unitary school system, which the District Court ordered the defendants to put into operation, took into consideration the six areas listed in *Green* v. *County School Board of New Kent County,* 391 U.S. 430, (1968),

1. Faculty and 2. Staff.

a. Elementary Schools.

During the 1969-70 school year the Broward School System employed 2,374 elementary school teachers of which 1,821 were White and 553 were Black, i.e., 77% of the elementary school teachers were White and 23% were Black. During the current 1970-1971 school year plans call for 2,276 elementary school teachers of which 1,691 will be White and 585 will be Black, i.e. 75% White and 25% Black. The unitary school system plan requires that each of the 83 elementary schools have a faculty composed of 75% White teachers and 25% Black teachers. See Court Order Addendum No. 4 to Broward County Desegregation Plan.

b. Middle Schools and Junior Highs.

During the 1969-70 school year the Broward School System employed 1,248 teachers in the middle schools or junior highs of which 1,067 were White and 181 were Black, i.e., 15% of these teachers were Black. During the current 1970-71 school year plans call for 1,246 middle school or junior high teachers of which 996 will be White and 250 will be Black, i.e., 80% will be White and 20% will be Black. The unitary school system plan requires that each of the 20 middle schools or junior highs have a faculty composed of 80% White teachers and 20% Black teachers. See Court Order Addendum No. 4 to Broward County Desegregation Plan.

c. High Schools.

During the 1969-70 school year the Broward School System employed 1,262 high school teachers of which 1,071 were White and 191 were Black, i.e., 15% of the high school teachers were Black. During the current

1970-71 school year plans call for 1,620 high school teachers of which 1,295 will be White and 325 will be Black, i.e., 80% will be White and 20% will be Black. The unitary school system plan requires that each of the 12 high schools have a faculty composed of 80% White teachers and 20% Black teachers. See Court Order Addendum No. 4 to Broward County Desegregation Plan.

The plan requires that administrators will be assigned to elementary schools without regard to race, and at least one Black administrator and one Black counselor will be assigned to each secondary school. It further provides:

> "Broward County will institute an aggressive program of recruiting and training Black administrators for the central office staff."

3. Transportation.

Bus routes and the assignment of students to buses have been designed to insure the transportation of all eligible students (under Florida law, all students living more than two miles from their assigned school) on a non-segregated and otherwise non-discriminatory basis. See Court Order Addendum No. 8 to Broward County Desegregation Plan.

4. Extracurricular Activities.

Integration of the extracurricular athletic activities began during the 1961-62 school year and was completed during the 1966-67 school year. This included integration of the coaching staffs as well. Integration of all other extracurricular activities was also completed before filing of the instant case. Thus it was not necessary to formulate a plan for desegregation of

extracurricular activities since desegregation had already occurred several years ago. See Court Order Addendum No. 9 to the Broward County Desegregation Plan.

5. Facilities.

With desegregation of faculty, staff and student bodies, all facilities have also been desegregated with regard to race or color.

6. Composition of Student Bodies.

The district judge summarized the results under this heading as follows:

> "In the plan heretofore outlined under 'A Unitary System' there will be 3,277 Black students, in four elementary schools, attending segregated schools, out of 26,685 Black students in the whole system. This constitutes 12.3% of the Black students attending segregated schools and 87.7% attending desegregated schools. There are seven other elementary schools where the student bodies are 92% or more Black. Although student bodies composed of 8% or less Whites may be minimal desegregation, it is consistent with the desegregation achieved under the equidistant formula which was approved on February 17, 1970, by the Fifth Circuit in *Ellis* v. *Orange County, supra,* (423 F.2d 203, 5th Cir., 1970) (See Appendix II of *Ellis,*) and appears no less acceptable when achieved through the plan here used. It is not the plan but the results that count.
>
> * * * * *
>
> "The majority to minority transfer provision and review by the Bi-racial Committee in the areas of school site selection, pupil transfer, and transportation are designed to assure further desegregation in the future."

5. THE COURT OF APPEALS' DESEGREGATION PLAN.

The plan ordered implemented by the Court of Appeals concerns only the racial composition of the student bodies at 40 of the 83 elementary schools in the Broward School System. The plan results in racially balancing these 40 schools, that is, except in two instances, Blacks are reduced to a minority status. Thus the 13 elementary schools under the District Court's plan at which Blacks constituted 90 per cent or more of the student body are eliminated.

The appellate court grouped these 40 schools into three clusters of four schools (a total of twelve schools), eight clusters of three schools each (a total of twenty-four schools), and two pairs of two schools each (a total of four schools).

The District Court's plan had provided:

> "Any pupil, with parental consent, shall have the right to transfer from a school at which his race is in the majority to the next nearest school at which his race is in the minority and the board shall furnish free transportation provided the distance involved meets state transportation statutes."

The appellate court ordered this ruling modified to provide that "(1) any pupil shall have the right to transfer from a school at which his race is in the majority to *any* school (not just the next nearest school) at which his race is in the minority and (2) transferees shall be given priority for space." (Emphasis by the Court of Appeals.)

6. IMPLEMENTATION OF THE COURT OF APPEALS' PLAN.

The District Court by order dated August 28, 1970 ordered Broward County schools to open on schedule on August 31, 1970 and to follow the original desegre-

gation plan of April 30, 1970. By the same order, the District Court made the grade assignments to the clustered elementary schools, the only area of discretion permitted it by the Court of Appeals' decision of August 18, 1970.

Although the school superintendent requested until February 1, 1971 in which to complete implementation of the Court of Appeals' desegregation plan, the District Court by order of September 4, 1970 ordered complete implementation no later than November 15, 1970. By that date the school system may be able to obtain the 57 additional buses needed to bus the 11,671 additional students which will be entitled to busing under state law [3] as the appellate court's plan is implemented.

REASONS FOR GRANTING THE WRIT

INTRODUCTION.

This case merits review on certiorari because it involves important legal questions about implementing *Brown I,* 347 U.S. 483, (1954) and *Brown II,* 349 U.S. 294 (1955), and because it will have important practical consequences regarding elementary school desegregation.

The petitioners, the Board of Public Instruction of Broward County, Florida, and the School Superintendent, recognize their affirmative responsibility to provide a desegregated, unitary and non-racial school system now in compliance with the decisions of this Court. We realize that school boards "may no longer operate

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[3] *Florida Statutes* Ch. 234 requires that the school system provide transportation to students living more than two miles from their assigned schools.

a dual school system based on race or color", but must "begin immediately to operate as unitary school systems within which no person is to be effectively excluded from any school because of race or color". *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19, (1969).

Indeed, the good faith of the Broward School Board has never been questioned. The Court of Appeals itself in the instant case observed at footnote 3 of its opinion that the School Board on its own initiative had gone beyond even the detailed requirements of *Singleton* v. *Jackson Municipal Separate School District,* 5 Cir. 1970, 419 F.2d 1211 (*en banc*), *rev'd, in part sub nom. Carter* v. *West Feliciana Parish School Board,* 1970, 396 U.S. 290, 90 S. Ct. 608, 24 L. Ed. 2d 477 (*per curiam*) (reversal limited to the issue of *timing* of student desegregation), in developing a desegregation plan that would actually work. The appellate court commented:

> "[3] The court's order also noted that the school board, apparently on its own initiative, had made plans to conduct an extensive orientation program to prepare faculty and staff for the advent of desegregation. We are inclined to agree with the Board that 'although *Singleton* did not require such an orientation program, obviously one is necessary if the unitary school system plan is going to work.' Brief of Appellees at 9."

As the Court of Appeals stated at page 6 of its decision, "The real bone of contention in this case is student assignment at the elementary school level."

Although the appellate court rejected the elementary school assignments of the District Court plan based on rezoning, surprisingly, it also largely rejected the

pairing proposals of the Desegregation Center at the University of Miami, which were suggested as an alternative method in case rezoning did not work. Rather than remanding the case with order to implement at once the Desegregation Center's plan pending development of an educationally sound and constitutionally acceptable plan by the local educators, the appellate court acted as both judges and educators in developing a desegregation plan of its own for the elementary schools.

In Part I, *infra,* petitioners submit that the appellate court's elementary school desegregation plan violates the Equal Protection Clause of the United States Constitution.

In Part II, *infra,* petitioners submit that the appellate court violated due process and abused its discretion in devising a desegregation plan of its own rather than remanding the case with directions to develop an acceptable plan.

I.

The Court of Appeals' Elementary School Desegregation Plan Violates the Equal Protection Clause in That It Creates a Dual School System Which Sends 27,000 Students to Up to Four Different Schools, Each of Which Contains Not More Than Two Grade Levels, During the Six Elementary Years; and, Which Permits 25,000 Other Students to Attend Neighborhood Schools Containing All Six Grade Levels and Offering the Rich Variety of Programs That Only a Complete School Can Provide.

The Court of Appeals found that Broward County under the District Court's plan had four all-Black elementaries and nine elementaries that were 90 per cent or more all-Black out of a total of 83 elementaries.

The appellate court grouped 40 of the schools into clusters in order to eliminate the all-Black or pre-

dominantly Black schools. This grouping affects 27,000 of the total 52,000 elementary school children. Most of the schools and students affected live in the central, older parts of Broward County. As the court noted at pages 10-11 of its decision, the Black population is concentrated in this core area.

In Broward County, as in many other urban counties in America, the upper-income White families live in a suburban belt around the central area. These families supply most of the 25,000 elementary students who are unaffected by desegregation orders because they live far away from Black neighborhoods. They will continue to attend all-White or predominantly White neighborhood elementary schools.

In contrast, the plight of families living in the central area is well summarized by a Mrs. Gladys Mae Schmelz in a recent letter to the editor of the *Fort Lauderdale News* appearing on September 7, 1970:

> "I have eight children, six are in school and will be attending (if I send them) five different schools. Is this freedom?"

These "people problems" are explained in a report by the newly-appointed school superintendent, Dr. Benjamin C. Willis, as follows:

> "People Problems
>
> "Reorientation program for the community, parents, teachers to gain reacceptance and renewed cooperation in implementing the plan.
>
> "Family adjustment to children in as many as three elementary schools with a variation in opening and closing times for each. The family read-

justs to the loss of the services of the older children in supervising the younger ones in going to and from school, only to find that they must now belong to three P.T.A.'s.

"Program variation between paired schools minimizes the effectiveness of family involvement in assisting each other with school work.

"Many teachers will require additional inservice training in order to utilize effectively the new instructional environment into what they have been reassigned. This disruptive effect on the teachers will carry over to their interaction with students.

"Already successfully integrated situations are destroyed, and may never be rebuilt, and and the new ones required take at least as long to build as the old ones did." (63a)

The most disconcerting of the people problems concerns busing. The busing situation is summarized by the District Court's order of September 4, 1970:

"The system now transports 33,000 students with 102 busses of 75-student capacity each on regular routes, and 30 busses of 60-student capacity and with special lifts and equipment for the transportation of physically and mentally handicapped children. These special busses also carry regular students in order to make maximum use of capacity. There are 20 spare busses of the regular model and two spares of the special model. These spares are used to substitute for busses undergoing maintenance and for emergency runs when busses are broken down. The busses each make five round trips per day, the opening and closing times of the various schools being staggered in order to make this maximum utilization of the busses possible. This year the drivers begin leaving on their routes at 5:00 and 5:30 A.M. and the last of them return

> at 6:00 and 6:30 P.M., the drivers averaging eight and one-half to nine hours per day on the road.
>
> * * * * *
>
> "The additional students to be transported under the Fifth Circuit Court plan will be 11,671, requiring 57 new busses, each to be used on three round trips per day. All of these students meet the two mile statutory requirement, although there are many students residing less than two miles from their schools who should be bussed because of the safety factors."

The question of the constitutionality of such a massive busing program in order to completely eliminate every school with an all-Black or predominantly Black student composition is raised in *Swann* v. *Charlotte-Mecklenburg Board of Education* and the companion cases in which this Court has granted certiorari and scheduled oral argument for October 12, 1970. The legal problem of busing to achieve racial balance in that case and the instant one are the same. If the Court grants certiorari in the instant case, we shall present argument on that point.

However, the instant case presents the very serious additional constitutional question of whether the 27,000 Black and White elementary students who are going to be subjected to the trauma of having their elementary education split up among three or four schools are being denied equal protection of the laws when the other children in the outlying areas are permitted to enjoy normal educational experiences in neighborhood schools.

The decision of the Court of Appeals, while abolishing one dual elementary school system based upon racial groups, has effectively created a new dual school system based upon economic groups. Broward County

unquestionably has two types of elementary schools. One type is a neighborhood school, all-White or predominantly White, and contains grades kindergarten-fifth with a full-range of extracurricular activities and programs. The other type is located several miles from the student's home and most students have to be bussed to it; Whites are in the majority, but there are many Black students; it contains only one or possibly two grades with the resulting limited activity programs.

There are 43 elementary schools and 25,000 students in the first type of school. They are located in the heart of all-White, high-income neighborhoods. There are 40 elementary schools and 27,000 students in the second type. They are located within at least a few miles of a White or Black neighborhood.

This Court in *Brown* I in speaking of the harm done Black children by segregated schooling explained at 347 U.S. 494:

> "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

One wonders how the dual school system created by the Court of Appeals will affect the hearts and minds of the 27,000 little children in Broward County, ages five to twelve, one-sixth of whom are attending school for the first time in their young lives.

The doctrine of separate but equal, once buried by this Court in *Brown* I, now comes back from the dead. Petitioners are in a quandary how they should treat this new group of schools created by the appellate court. The 40 and the 43 are obviously separate types

of schools. They are equal as far as the traditional notions of "readin', writin', and 'rithmetic" go, but those ideas are as outmoded in modern elementary education as *Plessy* v. *Ferguson,* 163 U.S. 537, (1896), is in the law.

Now elementary schools are involved in art, music, drama, dancing, foreign languages, assembly programs, carnivals, athletics—an almost endless variety of activities. There are also many special programs to meet the special problems of the students—from remedial reading to speech therapy. In these areas the 40 clustered schools must inevitably suffer. The vast richness of the modern elementary school is dependent upon having a multi-graded curriculum and a diversified student body of several age groups. There just cannot be, for example, the leadership training experience of participation in safety patrol when the school contains only first graders, and a school composed only of fifth and sixth graders does not need a safety patrol.

In sum, these 27,000 Black and White elementary school children will receive their elementary education in up to four different schools, located far from their homes, which will be decidedly inferior in the richness and variety of their programs as compared to the 43 schools which the other 25,000 children will attend.

II.

The Court of Appeals Violated Due Process and Abused Its Discretion in Ordering Implementation of an Elementary School Desegregation Plan of Its Own Creation Without Benefit of a Record Supplying the Necessary Information.

The district judge in this case faced an acutely difficult problem in devising a constitutionally acceptable unitary school system for Broward County. Brow-

ard County is located on the lower southeast coast of Florida, known as the "Gold Coast". It includes the City of Fort Lauderdale, and is largely an urban county.

The school system currently includes 116 schools and approximately 120,000 students. To completely desegregate this large school system would be difficult enough. However, the problem is compounded because much of the school system lies in the future. Broward County is either the fastest growing county in America or one of the fastest growing. This causes a tremendous increase in growth of student population which has been averaging about eight per cent per year. For example, there are 8,000 more students this year than last year.

To provide school buildings for these new students the electorate approved a $108.6 million bond issue in 1968. A total of 45 new schools will be added by the 1972-73 school year.

Nor is the school board just building new schools. It has completely revised the educational program for all students. The curriculum is expanding to include kindergartens. Junior highs are being phased out, and middle schools are being phased in. These sweeping changes are reflected by the changes in grade alignments as follows:

High Schools	From 10-12	To 9-12
Junior High Schools	From 7-9	To Elimination
Middle Schools	From Nonexistent	To 6-8
Elementary Schools	From 1-6	To K-5

The plan devised by the judges of the Court of Appeals sitting as educators completely neglects these educational factors. This is readily understandable because the record before the court was devoid of a consideration of educational objectives.

The district judge never attempted to act as an educator. After suit was filed on January 9, 1970 and he determined on January 22nd that Broward County did not have a unitary school system, his only concern was to get one into operation as soon as possible. Questioning the constitutionality of the Board's desegregation plan filed February 16, 1970 because of the number of all-Black elementary schools contained in it, he referred the plan to the Desegregation Center at the University of Miami.

The Desegregation Center is one of many such centers established at universities across the South and supported by federal grants in order to assist local school boards in developing acceptable desegregation plans.

The Center reviewed the Board's plan between March 3, 1970 and March 27, 1970. The Board incorporated many of the Center's recommendations into its revised plan of April 13, 1970. The district judge reviewed the Center's recommendations, the Board's revised plan, and the suggestions of the plaintiffs as well as those of a number of intervenors. The Final Order of April 30, 1970 is based on the revised plan with some slight modifications of it.

Strangely, the Court of Appeals in rejecting the District Court's plan with respect to some student assignments to elementary schools, completely disregarded the proposals of the educators at the Desegre-

gation Center which, like the appellate court's own plan, achieved racially balanced elementary schools through massive busing, but at least tried also to conform to the new educational program of the Board. In this regard, the Court of Appeals grossly abused its discretion and violated every concept of due process.

The district judge explained the educational problems created by the appellate court's order as follows in his order of September 4, 1970:

> "Most of the implementation of the Fifth Circuit Court plan may be made on an emergency basis within the thirty days time suggested by plaintiffs, although, of course, the orderly preparation for the education of the children in such areas as adjustment of curriculum and in-service teacher training cannot be carried out within that time. Particularly distressing, for example, is the situation that arises in the grouping of schools in which one is presently used predominantly for children of migrant laborers under a special federal grant, where the teachers have been specially trained, and curriculum devised to supply deficiencies in culturally deprived children, many of whom are slow learners; where the second school in the group was built without classroom partitions under the new 'open school' concept, coupled with team teaching and specially trained teachers and substantial obliteration of grade levels as applied to the teaching materials and curriculum so the child may progress in accordance with his capacity and inclination; and where a third school, of older vintage, uses the traditional grade levels and concepts. There does not appear to be sufficient discretion left to this court under the Fifth Circuit Court order to make allowances for these educational differences." (100a)

School officials testified at a hearing on September 2, 1970 that they could well lose their federal grant to

continue the program for children of migratory workers now located at Markham Elementary School. Markham was clustered with Palmview and Tedder, and the Markham students are disbursed among the three schools. Obviously it will now be impossible to single out the children of migratory workers for special remedial education since they are blended in with the Black and White children who have always had stable educational experiences. The migrant children will once again become the forgotten children.

Petitioners do not mean to imply that the distinguished judges of the Fifth Circuit who decided the instant case are intentionally cruel or heartless. When they included Markham in the cluster, they simply did not know that it was a special school financed by a federal grant to help children of migrant workers because there was nothing in the record describing the special characteristics and programs of each school.

Significantly, the educators at the Desegregation Center did not include Markham in their pairing proposals to achieve racially balanced elementary schools.

This Court stated in *Green* v. *County School Board of New Kent County,* 391 U.S. 430 at page 442 that school boards must

> "fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools."

The appellate court followed that admonition in the instant case with a commendable devotion. The trouble is that the concept of "just schools" has no place in education. School boards are attempting to develop schools as individualized and varied as their students. Markham is, or was, such an example.

The Court of Appeals treated each of the 83 elementary schools as identical and interchangeable. Some are, some are not. The Markham blunder by the court repeats itself. The teachers and administrators of Broward County feel like doctors during an epidemic who find that someone has smashed their equipment for treating their patients. Broward County is experiencing an epidemic of new students from all over the country with all kinds of educational problems. It has the trained personnel and special schools to deal with the needs of slow learners, fast learners, physically handicapped children, children of migrant workers, etc.

The appellate court's decision, without any record to guide it in this area, simply lumps together 40 schools in the central area into various clusters, and turns each school, no matter what its special characteristics may be, into a school embracing not more than two grade levels.

From the legal point of view, the court's proceeding to arbitrarily make student assignments without the guidance of a supporting record is a manifest abuse of discretion. However, from the educational point of view, the court's decision is a disaster overwhelming to the Broward educators who have worked so hard to raise the school system from the depths of the teacher strike of several years ago by developing the five-year qualitative improvement program, rallying voter support for the $108.6 million bond issue, and getting the new schools designed and built so that they could be adaptable to the needs of the students.

In striking contrast, the educators at the Desegregation Center tried to harmonize the goal of racial balance

with the educational goals of Broward officials. The school board, as indicated *supra,* is in the midst of a five-year program that will divide the system into elementary schools, middle schools, and high schools.

The Center's proposals affect only 23 elementary schools; the court's plan affects 40. The Center suggests that one school be phased out, sixteen be paired, and the remaining six be grouped into two groups of three schools. The court's plan divides 40 schools into three groups of four schools, eight groups of three schools, and two groups of two schools. The Center's proposals require busing of an additional 3,260 elementary students. The court's plan requires busing of an additional 11,671 elementary students.

The Center's proposals attempted to divide the elementary schools affected into two groups: "elementary" schools of kindergarten through second grade and "intermediate" schools of third-fifth grades. Sixth grades would begin middle school. These proposals would permit the board to continue its "open school" concept of obliterating grade levels and allowing students to progress at their own learning speed. The board could continue to experiment with the use of teaching teams and new teaching materials.

On the other hand, the court's plan by grouping schools in clusters of three or four schools means that each school cannot possibly have more than two grades and many will have only one. This effectively forecloses the type of experimentation in teaching methods which the Broward educators have been conducting in recent years and which the Desegregation Center educators tried to preserve.

Moreover, under the Center's plan, instead of a student attending only three schools in his thirteen-year

educational experience, the students in the affected schools would attend four. Under the court's plan this would increase to five or six. No one knows what these disruptions coming in the early years of formal education will have upon the children's lives.

Comparison to the Finger plan ordered by the district judge in *Swann* v. *Charlotte-Mecklenburg Board of Education,* now on certiorari before this Court, is illuminating. First of all, the district judge, rather than developing a plan on his own as the Court of Appeals did in the instant case, called in an educational consultant, Dr. Finger, to meet with the school system's administrators and to develop a desegregation plan.

The Finger plan involves busing only 9,300 elementary students. The schools are paired with grades one through four attending one school and grades five and six in the other. How much more rational this plan seems than the one ordered by the Fifth Circuit in the instant case which buses elementary children to a different school every year or at least every other year. Yet the Fourth Circuit found the Finger plan unreasonable and rejected it!

Nevertheless, petitioners do not intend any endorsement of the Desegregation Center's proposals. We believe that the pairings suggested by the Center in the instant case are educationally unsound, and therefore they should not be implemented. We do not know enough about the Finger plan to comment on it except what we have said *supra.*

However, this dispute between petitioners and the Desegregation Center is essentially a dispute between educators over educational issues. All agree upon the necessity of a unitary, non-racial school system in

Broward County now. Many differences arose between these same two groups of educators over desegregation of the high schools and middle schools. But these differences were resolved and plans have been implemented which meet with the approval of the Court of Appeals. If this Court rules in *Swann* and its companion cases that racial balancing is to be the test, then there is no reason to believe that the petitioners, the Desegregation Center, the respondents, and the district judge cannot develop at once a satisfactory racial balancing plan for the elementary schools that will also be educationally sound just as they have already done for the high schools and middle schools.

This Court wisely observed in *Brown II,* 349 U.S. 294 at 299:

> "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts."

III.

Summary.

This case, like *Swann* and its companion cases, raises the great questions of whether, as a constitutional matter, any particular racial balance must be achieved in the schools; to what extent school districts and zones

may or must be altered as a constitutional matter; to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court.

However, even if the Court resolves these questions adversely to the Charlotte-Mecklenburg Board of Education, it will not dispose of the instant case which also raises questions of equal protection of the laws and due process.

The Court of Appeals in the instant case has created a new dual school system that subjects 27,000 elementary school students to a distorted and inferior education. It has abrogated to itself, albeit inadvertently because it has acted without the guidance of a record, final decision-making power over basic curriculum and educational programs at the 40 schools affected by its order.

Time and again this Court has acted to right the wrong done to a single individual. For the 27,000 little children involved, children of migrant workers, Black children, White children, this petition for a writ of certiorari is the end of the line. No one knows how the lower court's order creating a new dual school system and stripping local educators of the ability to experiment and develop new educational programs will affect the hearts and minds of the children involved.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for certiorari should be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

CHARLES E. PLEDGER, JR.
PLEDGER & MAHONEY
925 Washington Building
Washington, D. C. 20005

WILLIAM M. O'BRYAN
FLEMING, O'BRYAN & FLEMING
1415 East Sunrise Boulevard
Fort Lauderdale, Florida 33304

EDWARD J. MARKO
MENDEZ, SHAW, MARKO & STEPHANY
1040 Bayview Drive
Fort Lauderdale, Florida 33304

Attorneys for Petitioners